RECORD AND BRIEF

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Nos. 16-74 & 16-86

In the Supreme Court of the United States

ADVOCATE HEALTH CARE NETWORK, ET AL.,
Petitioners,

v.

MARIA STAPLETON, ET AL.,
Respondents.

SAINT PETER'S HEALTHCARE SYSTEM, ET AL.,
Petitioners,

v.

LAURENCE KAPLAN,
Respondent.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE THIRD AND SEVENTH CIRCUITS

BRIEF *AMICUS CURIAE* OF THE BECKET FUND FOR RELIGIOUS LIBERTY IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the First Amendment permits civil courts and government agencies to second-guess a church's sincere recognition of a hospital as a part of the church.

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INTEREST OF THE *AMICUS*[1]

The Becket Fund for Religious Liberty is a nonprofit law firm that protects the free expression of all faiths. The Becket Fund has represented agnostics, Buddhists, Christians, Hindus, Jews, Muslims, Santeros, Sikhs, and Zoroastrians, among others, in lawsuits across the country and around the world.

The Becket Fund has often advocated both as counsel and as *amicus curiae* to protect the autonomy of religious organizations and prevent government entanglement with religion. See, *e.g.*, *Hosanna-Tabor Lutheran Church & Sch.* v. *EEOC*, 132 S. Ct. 694 (2012) (representing petitioner); *Colo. Christian Univ.* v. *Weaver*, 534 F.3d 1245 (10th Cir. 2008) (as *amicus curiae*). Specifically, the Becket Fund has filed amicus briefs in several of the cases that are part of the nationwide church plan litigation launched by counsel for Respondents. See Briefs *Amicus Curiae* of The Becket Fund for Religious Liberty in: *Overall* v. *Ascension Health*, No. 14-1735 (6th Cir.) (dismissed Nov. 20, 2015), *Rollins* v. *Dignity Health*, --- F.3d ----, 2016 WL 3997259 (9th Cir. July 26, 2016), *Rollins* v. *Dignity Health*, 19 F. Supp. 3d 909 (N.D. Cal. 2013), *Stapleton* v. *Advocate Health Care Network and Subsidiaries*, 76 F. Supp. 3d 796 (N.D. Ill. 2014), *Kaplan* v. *Saint Peter's Healthcare System*, 810 F.3d 175 (3d Cir. 2015).

The Becket Fund is concerned that the lower courts' decisions, if left in place, would impermissibly

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[1] No party's counsel authored any part of this brief. No person other than *Amicus Curiae* contributed money intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief, and letters indicating consent are on file with the Clerk.

entangle the state in religious decision-making and interfere with church autonomy.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The church-plan exemption, as it has existed for over 35 years, has offered a uniform, balanced approach that allows religious organizations a way to carry out their ministries and provide benefits for their clergy and other employees while also providing oversight protecting those employees. This approach provides a measured exemption from a law that would otherwise be a significant burden on churches.[2]

The Third and Seventh Circuits have—at the behest of Respondents' counsel—upset this balance by interpreting the church-plan exemption to require a significant change to the IRS's longstanding rule: the definition of a church plan no longer may include plans established by religious organizations "controlled by or associated with a church."

If left in place, these decisions would have grave consequences for the ability of religious groups to define themselves and control their internal organization. The social reality of religious organizations in this country—the world's most religiously diverse—is that there is no single template for how religious groups organize themselves. Yet the Third and Seventh Circuits would force government officials to treat every kind of religious polity as if it were a low-church Protestant denomination like the Primitive Baptists,

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[2] Similar to IRS practice, *Amicus* uses the term "church" throughout this brief to refer to religious organizations of all faith traditions.

where the legal form of a single nonprofit corporation tracks the primary unit of the religious polity. But many church polities simply do not map one-to-one onto specific legal structures. For instance, there is no civil legal analogue to the presbyterial form of church polity used by Reformed Christians or the connectional form of church polity used by Methodists. And the Roman Catholic Church is *sui generis*, with a host of different church entities—some legally incorporated, some not—that finds no analogue in any civil legal system. Yet Respondents would penalize some churches for organizing themselves into many different entities rather than a single body.

This interference in the internal affairs of various churches runs directly counter to the Religion Clauses' protection of church autonomy recognized most recently by the Court in *Hosanna-Tabor*. Just as courts and government agencies like the IRS should not be in the business of second-guessing churches when they hire and fire ministers, courts and agencies should also not be in the business of second-guessing churches when they include a hospital within their overall ministry. As long as the inclusion is sincere, government officials should not gainsay it.

In using a stingy interpretation of the church-plan exemption, the lower courts have also invited unconstitutional inquiries that probe the fervor of religious organizations, giving credence to the Respondents' arguments below that Petitioners are not religious enough for the church-plan exemption because they "selectively choose[] which doctrines of their faiths to follow. A law that bases exemptions on questions of obedience to church doctrine is a clear violation of the

Establishment Clause. And forcing government officials or courts to decide the relative zeal of religious organizations is both unconstitutional and unwise.

Upsetting the status quo—as the Third and Seventh Circuits have done—leads courts and agencies back into a thorny inquiry over religiosity that Congress sought to forbid and upsets the constitutional balance that allows churches to conduct their own affairs according to their religious beliefs. The Court should intervene to restore the balance.

ARGUMENT

I. The decisions below endanger the First Amendment's protection of church autonomy.

A. Congress' intent in enacting the church-plan exemption was to avoid church-state conflict and comply with the Establishment Clause.

When Congress passed ERISA in 1974, it exempted church plans for the stated purpose of avoiding excessive government entanglement with religion. See 125 Cong. Rec. 10052 (May 7, 1979) (Sen. Talmadge); 124 Cong. Rec. 12106 (May 2, 1978) (Rep. Conable). In 1980, Congress amended ERISA to clarify that the church-plan exemption and its non-entanglement policy should include the plans of church-affiliated entities, such as hospitals and schools. See 125 Cong. Rec. 10052 (May 7, 1979) (Sen. Talmadge) ("Church agencies are essential to the churches' mission.").

Congress insisted on the 1980 clarification for church affiliates because it found the church-only rule had forced the IRS to engage in constitutionally sus-

pect determinations as to whether church-related entities were "religious" enough to be part of the "church." See, *e.g.*, IRS Gen. Counsel Mem. 37,266, 1977 WL 46200, at *1, *3-*6 (Sept. 22, 1977). Plainly religious entities were judged by whether they performed "secular" activities—even if those activities were central to the church's beliefs and purposes. See, *e.g.*, *id.* at *5 (ruling two orders of nuns were found to be outside the Catholic Church because their charitable work was not religious enough). Faith-based hospitals were some of the victims of the IRS's original approach. They were refused exemptions for inadequately engaging in "sacerdotal" functions even though their work for "the sick, poor, aged, and infirm" directly carried out religious requirements of the church. *Id.* at *1, *5.

The reaction to the IRS's approach was overwhelming. Dozens of groups representing diverse faiths joined together to form the Church Alliance for Clarification of ERISA and brought their concerns to Congress. See 125 Cong. Rec. 10052-58 (May 7, 1979). The American Lutheran Church also expressed concern over the intrusion of the IRS into the affairs of church groups and their agencies, finding the IRS should not define "what is and what is not an integral part of these religious groups' mission." *Id.* at 10055 (Letter to Sen. Talmadge). Other groups feared church agencies might be unable to fund their retirement plans if the plans were subject to ERISA. See *id.* at 10052-58.

In response, Congress expanded the church-plan exemption to cover plans of organizations that are "controlled by or associated with a church." Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364, § 407 (codified at 29 U.S.C.

§ 1002(33)(C)(i)). And the IRS quickly adjusted, finding plans established by religious nonprofits could qualify by mere virtue of their "affiliation with [a] church." IRS Gen. Counsel Mem. 39,007, 1983 WL 197946, at *4 (Nov. 2, 1982). Now, instead of asking if a nonprofit is religious enough to qualify as part of a church, the IRS asks only if the nonprofit shares "common religious bonds and convictions" with its church—a neutral inquiry that does not involve delving into religiosity. 29 U.S.C. § 1002(33)(A) & (C)(iv). Thus, since the amendment, the IRS has exempted plans maintained by church affiliates without distinguishing whether they were established by the affiliate or church in the first instance.

Now, three courts of appeals—two currently before this Court on petitions for writs of certiorari—have held that plans must not only share affiliation with a church, but must be established by a church. *St. Peter's Healthcare System* v. *Kaplan*, No. 16-86, Pet. App. 1a; *Advocate Health Care Network* v. *Stapleton*, No. 16-74, Pet. App. 1a; *Rollins* v. *Dignity Health*, --- F.3d ---, 2016 WL 3997259 (9th Cir. July 26, 2016). These decisions backtrack from Congress' intent in amending the church-plan exemption in the first place, and worse, they remove First Amendment protections of church decision-making on matters essential to core church functions.

B. The lower courts' decisions bless governmental coercion of church decisions about core church functions.

James Madison observed that the First Amendment was drafted in part to establish a "scrupulous policy * * * against a political interference with religious affairs." *Hosanna-Tabor Evangelical Lutheran*

Church & Sch. v. *EEOC*, 132 S. Ct. 694, 703-04 (2012) (quoting 22 Annals of Cong. 982-83 (1811)). Accordingly, this Court's precedent has long afforded religious organizations broad autonomy in matters of faith, doctrine, and governance. See *e.g.*, *Serbian E. Orthodox Diocese for U.S. & Can.* v. *Milivojevich*, 426 U.S. 696, 722 (1976); see also *Hosanna-Tabor*, 132 S. Ct. at 704-05.

Congress has honored this "scrupulous policy" in the context of church pension plans by respecting the right of churches to be free from political meddling. See Exec. Sess. of S. Comm. on Fin. (June 12, 1980), 96th Cong., 2d Sess. at 41 (Sen. Talmadge) ("I think we have got a question of separation of church and state here, number one, gentlemen, and, number two, I don't believe we ought to get [in] a row with every religious faith in the country."). Churches in this country have offered pension plans to their clergy and other workers for hundreds of years, since at least the 18th century. See R. Douglas Brackenridge & Lois A. Boyd, *Presbyterians and Pensions: The Roots and Growth of Pensions in the Presbyterian Church (U.S.A.)* 7 (1989). And because a church's choice to have an affiliate ministry establish and maintain such a plan for its workers is a decision that "affects the faith and mission of the church itself," it should be a decision made free from government coercion. *Hosanna-Tabor*, 132 S. Ct. at 707. Indeed, allowing church affiliates to establish exempt pension plans respects the constitutionally recognized authority of churches to carry out their religious missions in the way they see fit, whether directly or indirectly. See *Hosanna-Tabor*, 132 S. Ct. at 707 (recognizing the First Amendment right of religious organizations to make mission-related decisions).

The Third and Seventh Circuits' decisions, by contrast, remove an avenue for hundreds of churches to provide for their ministries by allowing them to establish their own church plans without a "searching and therefore impermissible inquiry" into internal church affairs. *Milivojevich*, 426 U.S. at 722-23. In those jurisdictions, religious organizations without close enough ties to a church to be considered a part of the church will not be able to obtain the church-plan exemption, even though, as Congress recognized when it amended the original church-plan exemption, "[c]hurch agencies are essential to the churches' mission[s]." 125 Cong. Rec. 10052 (May 7, 1979) (Sen. Talmadge). And, for many reasons, not all such agencies can—or should—be directly controlled by their affiliated house of worship. That determination is best left solely in the realm of the church, and not in the state's control. The lower courts' decisions ignore both that dynamic and the other unconstitutional effects those decisions will have on church autonomy. As we outline below, if these decisions are allowed to stand, churches will be wrongly pressured in a number of ways.

1. The lower courts' interpretation puts pressure on church decisions regarding church structure.

A narrow interpretation of the church-plan exemption places pressure on denominations to alter their structure. Classically congregational denominations, for instance, are not necessarily organized in a way that would allow them to require their agencies to maintain only ERISA-compliant plans. 125 Cong. Rec. 10052 (May 7, 1979) (Sen. Talmadge). Unlike strictly hierarchical churches, in many congregational denom-

inations each congregation autonomously and independently runs its own financial, theological, and administrative affairs. 1 W. Cole Durham & Robert Smith, Religious Organizations and the Law § 3:13 (2013). Thus, a denominational plan would not necessarily fit under the church-plan exemption and would have severe difficulties in complying with ERISA. 125 Cong. Rec. 10052 (May 7, 1979) (Sen. Talmadge) ("The inability of a congregational denomination to control its agencies makes it difficult to see how the church agency plan could meet the requirements of ERISA.").

Hierarchical churches, however, have other sound reasons to establish their agencies as separate entities. The Catholic Church, for instance, views hospitals and healing the sick as central to its religious mission. See *Catechism of the Catholic Church*, ¶¶ 1506-1509 (2d ed. 1994). But Catholic healthcare entities are often set up as "public juridic persons" under Catholic canon law;[3] these entities are therefore not necessarily controlled by or directly part of a Catholic diocese, even though they are undoubtedly considered to be integral parts of the Church as a whole. See 1983 Code c.116, § 1 (explaining how public juridic persons fulfill their missions in the name of the church). Under the lower courts' narrow interpretation, therefore, both hierarchical and congregational churches would face the choice Congress sought to remove: change their church organizational structure or imperil the

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[3] Under Roman Catholic canon law, a "public juridic person" is an aggregate of persons or things that oversees a Catholic establishment to ensure it is complying with Catholic teachings. 1983 Code c.114, § 1.

ability of their agencies to offer retirement benefits. See Durham & Smith, *supra*, § 3:13.

Aside from pressuring churches to amend their internal structures, the decisions below penalize churches that do change their internal structures for religious reasons, for instance by merging with the plans of other affiliates. Determining the nature and scope of church plans in a merger context is a frequent problem. Nancy S. Gerrie & Jeffrey M. Holdvogt, *View from McDermott: Top IRS and DOL Audit Issues for Retirement Plans*, Pension and Benefits Daily (BNA) No. 156, at 2 (Aug. 13, 2014) (improper exclusion of a merged-in group of employees is a matter the IRS regularly audits). For example, plans established by a church and an affiliate, respectively, would continue to be exempt after a merger. If church plans established by church affiliates are not recognized, however, courts will be forced to delve into whether the church-established plan's exemption is retained, shared, or destroyed—frequently a matter of church polity—again, one of the very concerns the exemption was designed to avoid. Rep. of S. Comm. on Fin. (Aug. 21, 1973), 93rd Cong., 1st Sess. at 81.

2. The lower courts' interpretation pressures churches' investment choices.

Limiting the exemption to pension plans established by churches could also threaten the ability of churches to carry out their religious missions and to invest retirement funds morally. Any type of church could prudently choose to set up hospitals as separate non-profit entities to guard against professional liabilities that might impede the church's ability to perform other religious functions. See Durham & Smith, *supra*,

§ 3:13. Moreover, applying ERISA's diversification requirements to church plans might prevent religious groups from investments that, in the religion's view, would promote social justice or avoid supporting evils. See 29 C.F.R. 2550.404c-1(b)(3)(i)(C); see also Lindsay Gellman, *Investing as a Religious Practice*, Wall St. J. (Nov. 3, 2013), http://www.wsj.com/articles/SB10001424052702304106704579135321491814430. If the lower courts' decisions are allowed to stand, churches' moral choices will be severely limited; but the church-plan exemption as it has existed until now allows churches to make these decisions without risking their ability to provide employee retirement plans.

C. The lower courts' interpretation of the church-plan exemption violates the Establishment Clause.

At a higher level of generality, the lower courts' decisions violate the Establishment Clause by inviting the government to do the very thing Madison warned against: establish rules "relative purely to the organization and polity of the church incorporated." *Hosanna-Tabor*, 132 S. Ct. at 704 (quoting 22 Annals of Cong. 983 (1811)). Church polity has long been one of the elements of religious liberty that belong firmly within the sphere of the church and ought not be interfered with by agency officials or courts. See, *e.g.*, *Jones* v. *Wolf*, 443 U.S. 595, 602 (1979) (First Amendment "requires that civil courts defer to the resolution of issues of religious doctrine or polity"); *Milivojevich*, 426 U.S. at 713 ("civil courts are bound to accept the decisions of * * *a religious organization * * * on matters of discipline, faith, internal organization, or ecclesiastical rule, custom, or law").

By offering an exemption to religious organizations only on the basis of their relationship with a "church" as defined by the IRS, the lower court decisions interfere with what is "'strictly a matter of ecclesiastical government.'" *Hosanna-Tabor*, 132 S. Ct. at 705 (quoting *Kedroff* v. *Saint Nicholas Cathedral of Russian Orthodox Church in North America*, 344 U.S. 94, 115 (1952)). An inclusive interpretation of the church-plan exemption, on the other hand, avoids this conflict by honoring the rights of churches to make autonomous decisions about whether and how to provide pension plans to their employees, as Congress intended when it enacted and amended the exemption.

II. The Petitions should be granted because the lower courts' decisions invite church-state entanglement.

The lower courts' interpretation of the ERISA exemption would also entangle courts and agencies in church-state inquiries the Constitution requires them to avoid: (1) judging the religious meaning of a particular belief or activity; (2) resolving religious controversies; and (3) evaluating the religiosity or orthodoxy of a person or group.

The First Amendment disfavors deciding legal rights based on whether the party in question was performing primarily "religious" or "secular" activities. See, *e.g.*, *New York* v. *Cathedral Acad.*, 434 U.S. 125, 133 (1977) ("The prospect of church and state litigating in court about what does or does not have religious meaning touches the very core of the constitutional guarantee against religious establishment."). Of course, courts or agencies must sometimes decide whether something is in fact religiously motivated—that is, whether an accommodation request is based on

sincerely held religious beliefs, rather than insincere beliefs or merely philosophical claims. See *Holt* v. *Hobbs*, 135 S. Ct. 853, 862 (2015) (sincerity testing); *Wisconsin* v. *Yoder*, 406 U.S. 205, 216 (1972) (claims must be religious, not philosophical). But governments risk unconstitutional entanglement when they attempt to categorize religious organizations' actions as "secular" or "religious." *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints* v. *Amos*, 483 U.S. 327, 343-44 (1987) (Brennan, J., concurring) (emphasizing the ability of religious groups to define their religious commitments); see also *Presbyterian Church in U.S.* v. *Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 449 (1969) (forbidding civil courts from resolving controversies over religious doctrine or practice).

Allowing only a church (as defined by the IRS) to establish an affiliated plan would require, for an exemption, that the government decide whether the affiliate is in fact part of that church. In some claims for exemption, the answer would be undisputed: a pension plan established by a Roman Catholic archdiocese or a local synagogue is clearly a plan established by a church. But what about a plan established by a religious order? Or a church advocacy group? Or a seminary? Or a missionary organization? Under the narrow interpretation at issue here, such cases would turn on whether the organization in question is part of a "church." And for the government to make that determination, an entangling assessment of the religious group's activities is necessary. Indeed, the Sixth Circuit recently rejected just such an approach in the context of the ministerial exception. See *Conlon* v. *Inter-Varsity Christian Fellowship*, 777 F.3d 829, 833-34 (6th Cir. 2015) (extending ministerial exception to

group dedicated to "Christian ministry and teaching"). And this aversion to strictly defining "churches" is directly analogous to the aversion to strictly defining "ministers" set forth in the concurring opinion of Justice Alito and Justice Kagan in *Hosanna-Tabor*, 132 S. Ct. at 712 (Alito, J., concurring). This kind of inquiry is exactly what Congress sought to prevent when it expanded the church-plan exemption to affiliates. See Exec. Sess. of S. Comm. on Fin. (June 12, 1980), 96th Cong., 2d Sess. at 41 (Sen. Talmadge).

More importantly, the First Amendment disfavors inquiries into internal religious controversies. See *Milivojevich*, 426 U.S. at 713 ("Religious controversies are not the proper subject of civil court inquiry."). The Supreme Court has stressed repeatedly that the Religion Clauses may be violated not only by court decisions, but also by the very process of inquiry that leads to courts' findings and conclusions. See *NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490, 502 (1979). In effect, secular courts' inquiries into internal church matters are an unconstitutional "'resolution of quintessentially religious controversies.'" *Hosanna-Tabor*, 132 S. Ct. at 705 (quoting *Milivojevich*, 426 U.S. at 720). By requiring affiliates to demonstrate that they are part of the church itself, the lower courts' decisions will require secular courts to take sides in ecclesiastical disputes.

Finally, Respondents' view encourages impermissible evaluations of levels of religiosity or orthodoxy—*i.e.*, whether a party is "religious enough," either in general or in relation to a group. See *Hernandez* v. *Comm'r*, 490 U.S. 680, 699 (1989) ("It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular

litigants' interpretation of those creeds."); *Colo. Christian Univ.* v. *Weaver*, 534 F.3d 1245, 1263 (10th Cir. 2008) (McConnell, J.) ("[T]he state may take no position" on what "Catholic—or evangelical, or Jewish—'polic[y]'" is without "entangling itself in an intrafaith dispute."). "Courts are not arbiters of scriptural interpretation." *Thomas* v. *Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 716 (1981), and should accordingly avoid delving into theological disputes, church discipline, ecclesiastical government, or church members' conformance to required moral standards. *Watson* v. *Jones*, 80 U.S. (13 Wall.) 679, 733 (1871).

Under any approach, the IRS must determine whether a church is in fact a church. But because under the lower courts' ruling *all* entities seeking to establish exempt pension plans must prove they are churches, the entangling inquiry necessary in some cases would become the rule in all cases—including those involving a clearly established church. Respondents allege that Petitioners did not qualify for the church-plan exemption because they did not establish they were religious enough to be a "church." See Complaint ¶¶ 86-88, *Kaplan* v. *St. Peter's Healthcare System*, No. 13-02941 (D.N.J. May 7, 2013) ("while Saint Peter's may purport to share common religious bonds and convictions with the Catholic Church, it in fact only *selectively chooses to share a bare few such bonds and convictions*, and ignores or abandons Catholic convictions when it is in its economic interest to do so.") (emphasis in original); Complaint ¶¶ 96-99, *Stapleton* v. *Advocate Health Care Network & Subsidiaries, Inc.*, No. 14-01873 (N.D. Ill. Mar. 17, 2014) (same). Respondents' interpretation of the law, as adopted by the Third and Seventh Circuits, thus *requires* courts and agencies to engage in an entangling inquiry.

* * *

The decisions below removed a decades-old protection of churches that allowed churches to exercise autonomy over their own structure and pension plans, and prevented government intrusion into questions of doctrinal affiliation. To do away with the church-plan exemption as churches have known it for years would open up a Pandora's box of church polity questions under the First Amendment and federal statutory law that would vex courts and agencies for years. The Court should intervene to keep the box shut.

CONCLUSION

The petitions should be granted.

Respectfully submitted.

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